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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and
THE CANADIAN PACIFIC RAILWAY CO.,
Petitioners,

AGAINST

EVELYN McAFOOS and WILLIAM NEFF
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners' Application

Petitioners, The Canadian Pacific Steamships, Ltd., and The Canadian Pacific Railway Co., seek certiorari to review the reversal by the United States Court of Appeals for the Second Circuit of the dismissal of the complaint by the United States District Court for the Southern District of New York.

Statement

The opinion below epitomizes the factual situation. Respondent McAfoos " " " who was employed as a magician's assistant aboard the vessel 'Empress of Scotland,' allegedly suffered personal injuries when she fell through

an opening in the hold of the vessel while it lay berthed in the Port of New York. She claimed that the boards which normally furnished the deck of the hold had been removed by crew members and not replaced. Thus liability might be predicated on either unseaworthiness or the negligence of the crew members. Although Miss McAfoos enjoyed the social status of a ship's officer, she never signed the ship's articles, was reported to have been listed by the ship as a passenger, and was paid by her employer, co-plaintiff Neff, rather than by the shipowner. On trial she might be proved to be a seaman, a passenger, or a business invitee. Her ambiguous legal status and the nature of the accident posed a procedural dilemma for the plaintiff at the threshold of the suit (* * * 19-20) * * * plaintiff's attorney commenced suit by filing a libel in the federal district court against the vessel and the shipowners, alleging negligence, unseaworthiness, and a claim for maintenance and cure, and describing Miss McAfoos as alternatively a crew member or a business invitee. The Jones Act, although not mentioned by name in the libel, was pleaded, * * * (20) * * * A month later plaintiff's lawyer filed a civil complaint against the shipowners in the same district court, alleging the same facts and theories; this time the Jones Act was mentioned by name and jury trial was asked on all issues. Before the defendants filed an answer Judge Levet granted their motion, dismissing the complaint as unduly vexatious and because plaintiff by filing a libel had already irrevocably elected to sue in admiralty instead of at law. D. C. S. D. N. Y., 143 F. Supp. 73. Thus plaintiff was left to proceed solely in admiralty, that is, without jury trial" (20-21)

***References herein to the appendix in this court are by page number.

Summary of Argument

1. There is no conflict in the expressions on the subject between the Second and Third Circuits which requires resolution by this Court.

2. The determination in respect whereof certiorari is sought is interlocutory, not final, and relates to a procedural, not substantive, phase of litigation.

3. The question is not novel and, in its underlying aspect, has been the subject of consideration by this Court.

POINT I

There is no conflict in the expressions on the subject between the Second and Third Circuits which requires resolution by this Court.

The carefully reasoned and clearly articulated opinion of the Court of Appeals for the Second Circuit has crystallized the basic question and has projected it into accurate focus. What is involved is no matter of substance but a remedial, procedural question.

The petitioners affect to assert that the "election" under the Jones Act has been the subject of divergent views by the Second and Third Circuits, which requires that this court speak thereon with finality. But, it is urged, there is no such conflict. Indeed, the views of the Court of Appeals in both Circuits, in respect of the question at issue, are in complete harmony with one another.

It is true that the Third Circuit in *Kuhlman* v. *W. & A. Fletcher Co.*, 20 F. (2d) 465 (1927), as the opinion herein of the Court of Appeals for the Second Circuit points out,

"* * * appears to support the appellees' contention for an early election, although the election there found was between a claim of negligence and a claim of unseaworthiness" (24). With understandable judicial restraint, Chief Judge Clark continues, "How far that part of the opinion is law in that circuit today may be considered doubtful. Compare *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 724; certiorari denied *American Eastern Corp.* v. *McCarthy*, 338 U. S. 868" (24).

The *McCarthy* case, decided twenty two years after the *Kahlman* case, is wholly antithetical to the determination in the *Kahlman* case. The decision in *McCarthy* represents a complete departure from the holding in the *Kahlman* case and, to the extent that the two decisions may be said to be in conflict, the *Kahlman* case must be deemed overruled and superseded by the later *McCarthy* decision.

Pinpointing the problem, Judge Maris in the *McCarthy* case, said at page 724 of that opinion:

> "* * * the claim derived both from the admiralty law of unseaworthiness and the Jones Act. * * *"

At page 725 the opinion continues:

> "The contention is that under the Jones Act the plaintiff was required to elect between these two bases for recovery and, therefore, could not rely upon both of them at the same time. In German v. Carnegie Illinois Steel Corp., 3 Cir., 1946, 156 F. (2d) 977, this court expressly rejected this contention, holding that it was error for the district court to require a seaman to make such an election."

In discussing the determination of this court in the case of *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316, to which case the petition adverts, as reflecting reliance thereon by

Judge Maris in the *McCarthy* case, the learned Judge quotes from page 324 of the opinion by this court in the *Baltimore* case:

> "'It follows that here both the libel and the subsequent action were prosecuted under the maritime law and every ground of recovery, open to respondent in the second case, was equally open to him first.'"

The opinion in the *McCarthy* case goes on to say at page 726:

> "This is a ruling by the Supreme Court that the ground of negligence of the crew under the Jones Act could have been asserted in the prior suit along with the grounds of unseaworthiness and negligence of the owner which had been asserted in that suit. The case is thus direct authority for the action here taken by the district court."

With penetrating insight, Judge Maris further discusses the ensuing result were one, entitled to sue both under the maritime law and the Jones Act, required, at his peril, to determine which of the actions he must "elect" to pursue and the effect of *res judicata* were he to guess wrong with a resulting adverse determination. Said the court at page 726 of the *McCarthy* opinion:

> "He would thus be denied the right to any day in court upon what may turn out to have been his only valid ground for relief. And in some cases the choice might well be the nice one, often baffling to the most experienced lawyer. * * * We cannot believe that Congress, when it passed the Jones Act as a measure for the relief of injured seamen intended that it should put them at their peril to any such choice as this."

Indicative of the complete abandonment of what may have been signified by the holding in the *Kuhlman* case, and of recognition of the fact that such case, which had preceded the McCarthy holding by twenty-two years, was not expressive of existing law, is a district court opinion in the same circuit, in 1951, in *Stalker* v. *Southeastern Oil Delaware*, 103 Fed. Supp. 436, wherein the court, with understandable understatement, said at page 439 of the opinion:

> "It seems clear that the concepts of the rights of an injured seaman have undergone a change since the Kuhlman case."

The district court, in its opinion, recognized the import of the holding by this court in the *Baltimore* case and, in keeping with the rationale of the *McCarthy* case, adopted the concept therein given cogent expression.

There is, therefore, no conflict between the Second and Third Circuits which requires resolution by this court. It is noteworthy that this court denied certiorari in the *McCarthy* case (338 U. S. 868).

POINT II

The determination in respect whereof certiorari is sought is interlocutory, not final, and relates to a procedural, not substantive, phase of litigation.

The judgment below is not final. The petitioners' motion to dismiss was made before answer; issue had not been joined. Petitioners so acknowledge. There is no basis for the petition, in the circumstances which here obtain, in respect of a remedial, procedural question.

A number of the cases cited by the petitioners deal with aspects of *res judicata* and estoppel by judgment, after trial. It is submitted that there is no case holding that the mere filing of a suit constitutes an "election" under the Jones Act. No case where there has not been a prior determination on the merits has permitted dismissal of a subsequent action.

Reduced to its essentials, the procedural problem is posed in the opinion of the court below (21):

> "Actually the complaint, filed with the court and served on the defendants, gave all concerned adequate notice that plaintiff was seeking jury trial on all possible issues; and it should make no difference under either the Admiralty Rules or the Federal Rules of Civil Procedure whether at that initial stage of pleading plaintiff demanded jury trial by motion to transfer or by what was technically a second action."

The court further said (23):

> "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial—whether jury or non-jury. Balado v. Lykes Bros. S.S. Co., supra, 2 Cir., 179 F. 2d 943, 945."

and reached the conclusion that (23)

> "We think that Congress, by its silence as to the time when 'election' must be made, intended that the time for seeking jury trial was to be governed by the ordinary rules of procedure. The opposite construction, accepted by the court below, sets an unnecessary snare for the average lawyer, allowing an initial faux pas in this difficult procedural situation to deprive his client of jury trial. * * *"

POINT III

The question is not novel and, in its underlying aspect, has been the subject of consideration by this Court.

The underlying principle was dealt with by this court in *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316 (1926). In any event, the rationale of the holding below, given cogent expression in the opinion of Chief Judge Clark, appeals to reason and the inherent justice of the cause. When Judge Maris in the *McCarthy* case, *supra*, construed the holding in the *Baltimore* case as "* * * direct authority for the action here taken by the district court", this court denied certiorari in 338 U. S. 868.

Conclusion

As the petitioners acknowledge, there is here involved not a final judgment but, rather, an interlocutory phase of litigation.

There is neither "substantial conflict" nor "confusion", as the petitioners contend there is, in the lower courts. The question posed by petitioners is not novel; it has been passed upon; there is no conflict between the Second and Third Circuits in respect of what the petitioners pose; indeed, certiorari in respect thereof has heretofore been denied by this court.

There is, therefore, no justifiable warrant for the application herein.

Respectfully submitted,

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